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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ANGEL AGUIAR, Individually and on Behalf of All Others Similarly Situated,

Plaintiff,

vs.

MERISANT COMPANY, and WHOLE EARTH SWEETENER COMPANY, LLC,

Defendants.

Civil No.: 2:14-cv-00670-RGK-AGRx

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND REQUEST FOR ENTRY OF FINAL JUDGMENT AND MOTION FOR APPROVAL OF ATTORNEYS' FEE AWARD, EXPENSE REIMBURSEMENT AND INCENTIVE AWARD AND IN RESPONSE TO OBJECTION

Judge: Hon. R. Gary Klausner
Date: February 2, 2015
Time: 9:00 a.m.
Ctrm: 850

Plaintiff Angel Aguiar ("Plaintiff") respectfully submits this reply memorandum in support of her Motion for Final Approval of Class Action Settlement and Request for Entry of Final Judgment ("Final Approval Motion") and Motion for Approval of Attorneys' Fee Award, Expense Reimbursement, and Incentive Award ("Fee Motion") (collectively, the "Motions") (ECF Nos. 117, 118) and in response to the objection by Michael Narkin ("Narkin").[1]

I. INTRODUCTION

The Settlement before the Court represents an outstanding result and should be granted final approval.[2] More than 31,000 claims have been filed, which is in line with the projected claims rate. ECF No. 122, Supplemental Decl. of Jeffrey D. Dahl with Respect to Implementation of the Notice Plan and Performance of Required Settlement Administration Activities ("Supp. Dahl Decl."), ¶22. Only three consumers seek to opt out of the Settlement. *Id*., ¶20. Moreover, only one objection (which as set forth herein is utterly meritless) remains. Notably, no governmental entity that received Notice has objected to the Settlement. Where there are an estimated two million Class Members, this represents an opt-out/objection rate of 0.000002%, which is an overwhelmingly positive response to this Settlement. Accordingly, Plaintiff requests that the Motions be granted and that the objection be overruled.

II. THE COURT SHOULD GRANT FINAL APPROVAL TO THE SETTLEMENT

In making a determination as to whether a settlement is "fair, reasonable,

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[1] The objection of Barbara Cochran (ECF No. 120) has been withdrawn on January 21, 2015. *See* Supp. Dahl Decl., ¶21; ECF No. 123. Therefore, there is only one objector in this case. As discussed herein, he is a serial objector with tainted credentials whose objection (duplicated from other cases in which he has objected) lacks merit.

[2] All capitalized terms not otherwise defined are defined in the Class Settlement Agreement. ECF No. 109-1.

and adequate" under Rule 23(e)(2), a court should consider the factors in *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575-76 (9th Cir. 2004).[3] While these factors were fully addressed in the memorandum in support of the Final Approval Motion ("Final Approval Mem.") (ECF No. 117), Plaintiff provides the Court with further detail as to the last factor, the reaction of the class to the proposed settlement, now that the objection and opt-out deadlines have passed.

Where, as here, the reaction of the Class is overwhelmingly positive, "the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members." *Nat'l Rural Telecomm. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004); *see also Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 967 (9th Cir. 2009) (affirmed approval of a settlement where 52,000 class members submitted claims and 44 objected); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454 (9th Cir. 2000) (affirmed approval of settlement of 5400 class members where one opted out). "A court 'may appropriately infer that a class action settlement is fair, adequate, and reasonable when few class members object to it.'" *Larsen v. Trader Joe's Co.*, 11-cv-05188-WHO, 2014 WL 3404531, at *5 (N.D. Cal. July 11, 2014).[4]

To date, over 31,000 Class Members have submitted claims, while only three Class Members have opted out, Supp. Dahl Decl., ¶¶20-22, and only one has objected. As the Supplemental Dahl Declaration details, the Notice Plan has resulted in the distribution of the Notice to millions of consumers. *Id.*, ¶14. Accordingly, the overwhelmingly positive reaction of the Class further supports

[3] Unless otherwise indicated, all citations are omitted and emphasis is added.

[4] As discussed below, Mr. Narkin – the sole objector in this case – made a very similar objection in *Larsen*. The Court there rejected Mr. Narkin's objection.

that the Settlement is fair, reasonable, and adequate.[5]

III. THE COURT SHOULD GRANT THE FEE MOTION

As discussed in the memorandum in support of the Fee Motion ("Fee Mem.") (ECF No. 118), consideration of the relevant factors used by courts in this Circuit demonstrates the requested fee award is reasonable under the percentage of the recovery and lodestar methods and should be approved. Fee Mem. at 3-14. Notably, although Plaintiff's Counsel have requested a total of 30% of the Settlement Fund, this amount represents ***both*** attorneys' fees as well as expenses. The attorneys' fee portion of the request amounts to only 23% of the Settlement Fund, well within the range of reasonableness in similar cases in this Circuit.[6] Fee Mem. at 5-6. The total lodestar, including expenses, applying Plaintiff's Counsel's customary hourly rates is $1,090,595. This represents a multiplier of 0.45, which is clearly within the range of multipliers awarded in this Circuit. Fee Mem. at 13-14. The meritless objection notwithstanding, the requested attorneys' fee and expenses award is reasonable and the Fee Motion should be granted.[7]

IV. THE COURT SHOULD OVERRULE THE OBJECTION

The sole objection before this Court comes from Michael Narkin: a serial

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[5] No Class Member objected to class certification or the Court-approved Notice Plan. Accordingly, Plaintiff requests that the Court grant final certification of the Settlement Class and find that the Notice Plan satisfied Rule 23 and due process requirements. Final Approval Mem. at 13-18.

[6] $1,650,000 Settlement Fund x 30% = $495,000. $495,000 – $118,854 in expenses = $376,146 which represents 23% of the Settlement Fund. Also, the final percentage will be even less, as the final lodestar does not include the attorney time spent subsequent to submission of the billing records, including, but not limited to, work on this brief, preparing for the final approval hearing, travel to Court for the final approval hearing, and the final approval hearing.

[7] No Class Member objected to the reasonableness of either the requested expenses or the incentive award. Therefore, Plaintiff requests that the Court approve reimbursement of the requested expenses and the incentive award. Fee Mem. at 14-17.

objector with a history of questionable motives. In assessing an objection, a court should endeavor "to distinguish between meritorious objections and those advanced for improper purposes." *Manual for Complex Litigation (Fourth)*, 21.643, p. 326. *See also In re Hydroxycut Mktg. & Sales Practices Litig.*, No. 09-md-2087, 2013 U.S. Dist. LEXIS 61674, at *68-69 (S.D. Cal. Apr. 29, 2013).

With sparse authority, Narkin's objection addresses four points, each of which is discussed below: (1) the relationship between the settlement and the damages; (2) the existence of a protective order; (3) the amount of attorneys' fees; and (4) the *cy pres* award. It is important to note, however, that Narkin's objection is almost a carbon copy of his "usual" objection in cases that courts have routinely rejected. *See*, *Rosales v. FitFlop USA, LLC*, 3:11-cv-00973-W-KSC, ECF No. 119, filed Apr. 24, 2014 (S.D. Cal.) (objection attached as Exhibit A to the Declaration of Amanda F. Lawrence ("Lawrence Decl.")); *Larsen v. Trader Joe's Co.*,, 3:11-cv-05188-WHO, ECF No. 102, filed June 6, 2014 (N.D. Cal.) (objection attached as Exhibit B to Lawrence Decl). It is therefore clear he objects not to further the class action process, but to frustrate it. *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 973 (E.D. Tex. 2000) (courts should be on alert for lawyers who lodge objections to otherwise proper settlements for the sole purpose of obtaining "a fee by lodging generic, unhelpful protests").

This is not surprising given Mr. Narkin's history. As the Northern District of California court recently noted:

> Michael Narkin is a former attorney who resigned from the California Bar facing 16 counts of misconduct. According to the San Jose Mercury News, after resigning from the Bar, Mr. Narkin set up the Saratoga University School of Law, "an Internet correspondence program where he served as dean and, from all appearances, faculty

> and administration." The newspaper article details complaints made by students that "Narkin took tuition up front and then did little in return." The law school was eventually stripped of its license by the State of California. Mr. Narkin has objected to other class action settlements in the past.

Larsen, 2014 WL 3404531, at *7 n.5.[8] Narkin's objection should therefore be viewed with extreme caution.

A. <u>Narkin Lacks Standing to Object to the Fee Motion.</u>

Before even addressing the (lack of) merits of Narkin's objection, it should be noted that he does not even have standing. Simply being a class member does not automatically confer standing to challenge an attorneys' fee award – the objecting class member must be "aggrieved" by the fee award. *In re First Capital Holdings Corp. Financial Prods. Sec. Litig.*, 33 F.3d 29, 30 (9th Cir. 1994). If modifying the fee award would not "actually benefit the objecting class member," the class member lacks standing. *Knisley v. Network Assocs., Inc*., 312 F.3d 1123, 1126 (9th Cir. 2002); *cf. Rodriguez v. Disner*, 688 F.3d 645, 660 n.11 (9th Cir. 2012) (addressing appellate standing) ("'objectors who do not participate in a settlement lack standing to challenge class counsel's . . . fee award because, without a stake in the common fund pot, a favorable outcome would not redress their injury'"). Here, Narkin has not filed a claim. Supp. Dahl Decl., ¶21. Thus, a reduction in the requested fee award would not redress any injury to Narkin.

[8] Indeed, there are numerous articles discussing Narkin's questionable history, noting a "track record that also includes a litany of malpractice suits against him." Lawrence Decl., Exh. C. http://www.lawschool.com/narkin.htm After surrendering his law license rather than face disciplinary charges for "ripping of his clients and botching their cases," Narkin started a correspondence "law school" wherein he gave students a "crash course in fraud." *Id.* In a five year time span alone, there were more than 30 complaints made against his law school concerning false advertising and fraud. *Id.*

Accordingly, Narkin does not have standing to object to the Fee Motion. *See, e.g.*, *City of Livonia Employees' Ret. System v. Wyeth*, 07 CIV. 10329 (RJS), 2013 WL 4399015, at *1-2 (S.D.N.Y. Aug. 7, 2013). Narkin's objection therefore should be overruled.

B. Narkin's Objection Lacks Merit.

Objectors bear the burden of proving any challenges to the reasonableness of a class action settlement. *See United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990). Narkin's canned objection fails to meet this burden.

To begin with, his first argument regarding the relationship between the settlement and damages has already been rejected in *Arnold v. FitFlop USA, LLC*, No. 11-CV-0973 W(KSC), 2014 WL 1670133, at *8 (S.D. Cal. Apr. 28, 2014) where the court found that "the settlement bears a close relationship to the Class Members' damages." That case also involved claims of false advertising and benefits that FitFlop footwear allegedly did not provide, causing customers to pay a premium. The settlement provided for injunctive relief and cash payments, including the possibility of receiving up to a complete refund. The exact same is true here: the Settlement calls for Defendants to change their marketing of PureVia and to make payments to class members. In fact, refunds to class members from the Settlement will be at least $5.00, which is more than the average price of certain Pure Via Consumer Products.

The majority of Narkin's objection is spent arguing that somehow the existence of a protective order in this case weighs against the fairness of the Settlement – a nonsensical proposition since protective orders are routine in complex civil litigation. The crux of his complaint seems to be that he was unable to see any of the documents produced in this case. The *Larsen* Court faced this verbatim argument from Narkin and held that "'[c]lass members who object to a

class action settlement do not have an absolute right to discovery.'" 2014 WL 3404531, at *7. *See also In re Wachovia Corp. Pick-A-Payment Mortgage Mktg. & Sales Practices Litig.*, No. 09-cv-02015 PSG, 2011 WL 1496342, at *1 (N.D. Cal. Apr. 20, 2011) ("'While objectors are entitled to meaningful participation in the settlement proceedings, and leave to be heard, they are not automatically entitled to discovery or to question and debate every provision of the proposed compromise.'"); *Hemphill v. San Diego Ass'n of Realtors*, 225 F.R.D. 616, 619 (S.D. Cal. 2004) (class members who object to a class action settlement do not have an absolute right to discovery).[9]

Narkin also claims that, due to the protective order, Plaintiff's Counsel may have seen "no need to engage in real discovery." This recycled argument has also been rejected specifically as to Narkin. *See*, *e.g. Larsen*, 2014 WL 3404531, at*8. Furthermore, it is clear that Narkin did not even read the settlement papers in this case, because, if he had, he would have seen that extensive discovery occurred here, including lengthy expert depositions. Fee Mem. at 7-8. Therefore, his objection on the grounds of the mere existence of a protective order is unsubstantiated.

Narkin's blanket objection to the amount of the proposed attorneys' fees as being "over reaching and represent[ing] unjust enrichment," aside from being another one of his routine objections, once again also shows his failure to read the papers in this case. The Fee Memorandum outlines how the requested fee is actually 23% of the Settlement Fund, thus falling below the 25% benchmark established in this Circuit. *Id.* at 5-6. *See also Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000) (25% is the benchmark). It furthermore shows that the

[9] Conveniently overlooking strong case law against his argument, Narkin cites to a case from a bankruptcy court in Georgia from 1981.

requested fee results in a fractional multiplier (of under 0.5) when the lodestar crosscheck is applied. *Id.* at 13-14. Indeed, this Court approved a very similar fee request in *Arnold* over the same (word for word) objection to the attorneys' fees from Narkin, ultimately finding that the fees (25% of the fund and a fractional multiplier of 0.44) were reasonable. 2014 WL 1670133, at*8.

C. Cy Pres

Finally, Narkin objects that the proposed *cy pres* relief and beneficiary are somehow inappropriate because the American Diabetes Association (the "ADA") has not been injured. This, however, is not the standard in the Ninth Circuit. Contrary to Narkin's baseless argument, the ADA has a sufficient nexus with the underlying claims and is a highly appropriate *cy pres* beneficiary. All the Ninth Circuit requires is that there be a "nexus [between the *cy pres* distribution and] the interests of the class members." *Lane v. Facebook Inc.*, 696 F.3d 811, 821 (9th Cir. 2012). The *cy pres* remedy simply "'must account for the nature of the plaintiffs' lawsuit, the objectives of the underlying statutes, and the interests of the silent class members[.]'" *Id.* at 821.

Here, the Action alleges consumer protection claims concerning the sale of artificial sweeteners. The ADA declaration clearly sets forth how "its mission conforms with the underlying objectives and purposes" of this case. *See*, ECF No. 109-10. The Action alleges that consumers were misled while attempting to purchase a "natural" sugar alternative in seeking a healthy and nutritious lifestyle. The ADA clearly has an interest in ensuring that members of the public can rely on the representations of alternative sweetener products, especially as some individuals selecting those products are doing so to assist in managing their diabetes. Accordingly, the Court should find that the ADA is an appropriate *cy pres* beneficiary and overrule Narkin's objection. *See*, *e.g. Mirakay v. Dakota*

Growers Pasta Co., Inc., No. 13-cv-4429 (JAP), 2014 WL 5358987, at *2 (D.N.J. Oct. 20, 2014) (ADA selected as *cy pres* beneficiary).

For the reasons stated herein, Narkin's meritless objection should be overruled.

D. Narkin's Objection Was Not Timely Filed.

Additionally, Narkin's objection is untimely. The Stipulation Regarding Dates for Final Approval of Settlement (ECF No. 114) (granted by this Court on October 17, 2014) (ECF No. 115) states that any Class Member wishing to object "must file any objections to the Settlement and the Motion for Attorneys' Fees, Costs, and Expenses and/or for Incentive Awards ***by no later than January 2, 2015***." ECF No. 114 at 2. This directive was repeated in the Court-approved long-form notice. ECF No. 109-3 at 7. The Clerk's date stamp indicates that Narkin's objection was not received until January 8, 2014, ***six days after*** the objection deadline. ECF No. 121. Thus, Narkin's objection should be overruled as untimely. *See, e.g., Nwabueze v. AT & T Inc.*, C-09-01529-SI, 2013 WL 6199596, at *7 (N.D. Cal. Nov. 27, 2013).

V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant the Final Approval Motion and the Fee Motion, overrule the objection of Narkin, and enter orders substantially in the form previously filed with the Court.

DATED: January 26, 2015

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2015, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email addresses denoted on the Electronic Mail Notice List, and I hereby certify that I caused the foregoing document or paper to be mailed via the United States Postal Service to the non-CM/ECF participants indicated on the Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on January 26, 2015.

/s/ Amanda F. Lawrence

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